IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2018-CA-01347-COA

JERRY P. ROARK, JR. A/K/A JERRY ROARK A/K/A JERRY P. ROARK **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF JUDGMENT:	09/12/2018
TRIAL JUDGE:	HON. WILLIAM E. CHAPMAN III
COURT FROM WHICH APPEALED:	RANKIN COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	JANE E. TUCKER BRENT M. BRUMLEY
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: ALICIA MARIE AINSWORTH
NATURE OF THE CASE:	CIVIL - POSTCONVICTION RELIEF
DISPOSITION:	AFFIRMED - 03/17/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE CARLTON, P.J., WESTBROOKS AND McCARTY, JJ.

McCARTY, J., FOR THE COURT:

¶1. This appeal is about whether Jerry Roark was deprived of effective assistance of counsel when his appellate lawyer did not inform him that he could seek certiorari review after an adverse ruling by the Mississippi Court of Appeals. Because Roark has failed to prove his counsel was ineffective, we affirm the trial court's denial of relief.

PROCEDURAL HISTORY

¶2. The basis of Jerry Roark's argument stems from his appeal to this Court in 2016 in a parole-revocation matter. *See Roark v. State*, 212 So. 3d 95, 96 (¶5) (Miss. Ct. App. 2016). In 2004, "Roark pleaded guilty in the Rankin County Circuit Court to charges of gratification

of lust and sexual battery." *Id.* at (¶1). After serving his sentence in Mississippi, he moved to Nevada under postrelease supervision (PRS) standards imposed by the trial court. *Id*. at (¶2). Later, Roark's Nevada parole officer alleged that Roark violated the terms of his PRS by "possessing sexually explicit material and accessing the internet through an electronic device that was not approved by his parole officer." *Id*. at (¶4). Roark also signed a waiver admitting to violating his PRS. *Id*. Upon his return to Mississippi for a formal revocation hearing, the State also argued that Roark had failed to pay required court costs. *Id*. at (¶5). The trial court revoked Roark's PRS, and Roark appealed after filing an unsuccessful motion for postconviction collateral relief (PCR). *Id*. In a 9-0 opinion, we affirmed the trial court's decision. *Id*. at 97 (¶10).

¶3. Roark was represented by two lawyers in the 2016 appeal. After our decision, one of the lawyers filed a motion for rehearing. It was denied on March 7, 2017. Under our Rules of Appellate Procedure, Roark had until March 21, 2017, to seek certiorari review from the Mississippi Supreme Court, provided that he did not seek an extension of time to file it. *See* M.R.A.P. 17(b) (A party seeking certiorari review must file the petition within fourteen days from the denial of rehearing.). Roark did not seek certiorari review or file a motion for time, and the mandate in the appeal issued, signaling the final end to the appeal. *See* M.R.A.P. 41.

¶4. About five months after the mandate issued, a new lawyer entered an appearance for Roark and sought leave to file an out-of-time petition for writ of certiorari. In the motion for rehearing, the lawyer represented that after the denial of his rehearing request "Roark was never advised that he could have filed a petition for certiorari to have the Mississippi

Supreme Court review the Court of Appeals Opinion." The lawyer also represented that "[t]he first notice that Roark had that the revocation had been affirmed was a letter from the [original lawyer] dated April 14, 2017, stating that a copy of the mandate was enclosed." The lawyer argued that it was only later that Roark learned he could have sought review from the Supreme Court and that he should be allowed to file an out-of-time petition for writ of certiorari due to ineffective assistance of counsel.

¶5. The Supreme Court declined to allow the out-of-time petition and dismissed the request "without prejudice to Roark's raising his ineffective-assistance-of-counsel claim in a subsequent" PCR motion.

¶6. Roark then filed the PCR motion in the trial court. He submitted an affidavit with the motion. The one-page affidavit set out four core facts: (1) his "parents paid to hire attorneys to file a post-conviction petition and an appeal after my probation was revoked"; (2) he "was not told that [he] could ask the Mississippi Supreme Court to hear [his] case by filing a petition for certiorari"; (3) if he had known that he would have instructed his attorney to file one; and (4) he only learned about the process after his parents later contacted another attorney to ask about any other relief for his probation revocation.

¶7. In order to fully assess the case, the trial court sua sponte ordered the record supplemented with the underlying criminal file, revocation pleadings, and hearing transcript. The trial court subsequently required the State to respond to Roark's PCR motion. The State's response centered on the precedent that there is no right to appointed counsel in PCR proceedings, let alone at the discretionary review stage of a request for certiorari—despite

the fact that Roark had paid and not appointed counsel.

¶8. Roark's former attorney provided an affidavit for the State to use to deflect his former client's claim for ineffective assistance of counsel. By implication, the affidavit admitted that the petition for writ of certiorari was not filed. Roark's former lawyer swore that he sent letters to Roark on March 27 and April 14 concerning this Court's decision. The affidavit by Roark's former lawyer stated, "Neither Jerry Roark nor Janet Roark made any contact after the letters were mailed." But both of these letters were sent after the March 21 deadline to seek certiorari review.

¶9. The trial court conducted a status conference and found that the facts were stipulated as outlined above. The trial court further found that the lawyer failed to advise Roark of the possibility of seeking certiorari review. But the trial court then concluded, "[N]otwithstanding counsel's failure to advise Petitioner of his right to file a petition for certiorari, that failure does not constitute ineffective assistance of counsel for the reason that Petitioner has no right to counsel to file a petition for certiorari and, therefore, has no right to effective assistance of counsel."

¶10. Roark appeals from this ruling. We affirm for reasons other than the one the trial court relied upon.

DISCUSSION

¶11. Roark's core argument is that he was denied the effective assistance of counsel because his retained lawyer did not advise Roark that he had the right to seek certiorari review. To succeed in a challenge to the effectiveness of counsel, Roark must prove that (1)

his counsel was deficient and (2) this deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶12. As it applies to appointed counsel at the certiorari stage, ineffectiveness was first addressed by the Supreme Court when our newly expanded "appellate system [was] still in its infancy," after the Legislature authorized the creation of this Court in 1995. *Harris v. State*, 704 So. 2d 1286, 1288 (Miss. 1997), *abrogated in part on other grounds by Jackson v. State*, 732 So. 2d 187, 191 (¶12) (Miss. 1999) (distinguishing death penalty cases). The Supreme Court explained that "[c]ertiorari is not a matter of right[.]" *Id*. Instead, certiorari "is to be considered only after the petitioner has sought review of the Court of Appeals decision by way of a [motion] for rehearing in that court, filed within fourteen days of entry of its judgment, unless additional time is allowed." *Id*.; *see* M.R.A.P. 40 (governing motions for rehearing); M.R.A.P. 17(b) (requiring a motion for rehearing to be filed before seeking certiorari review).

¶13. A "petition [for writ of certiorari] is a jurisdictional prerequisite for certiorari review by this Court," and the Supreme Court determined that "[t]o hold otherwise would be to deny finality to Court of Appeals decisions, contrary to the express declaration of finality" in both our Rules of Appellate Procedure and the statute establishing our jurisdiction. *Harris*, 704 So. 2d at 1288; *see* Miss. Code Ann. § 9-4-3(2) (Rev. 2019) ("Decisions of the Court of Appeals are final and are not subject to review by the Supreme Court, except by writ of certiorari.").

¶14. Harris argued that his appointed lawyer had failed him by not seeking certiorari

review after the Court of Appeals ruled. *Harris*, 704 So. 2d at 1288-89. The Supreme Court rejected this claim because "his underlying premise—that he is entitled to counsel in pursuing further discretionary review by this Court—is flawed." *Id*. at 1289. Harris had appointed counsel who handled the "core" appeal to the Court of Appeals, which relieved the lawyer of further representation because "[t]he right to appointed counsel in criminal proceedings is not without limits." *Id*. This posture led the Court to find "that this Court should not require continued assistance of appointed defense counsel where the defendant in criminal proceedings seeks certiorari." *Id*.[1]

¶15. Because this appeal concerns the "denial or dismissal of a PCR motion, we will only disturb the trial court's factual findings if they are clearly erroneous; however, we review the trial court's legal conclusions under a de novo standard of review." *Bass v. State*, 237 So. 3d 172, 173 (¶4) (Miss. Ct. App. 2017).

¶16. While the trial court did not explicitly invoke *Strickland*, it appeared to find that the first prong of the test was met, holding that Roark's counsel "fail[ed] to advise Petitioner of his right to file a petition for certiorari[.]" Yet the trial court did not proceed to the second prong, instead determining, "[T]hat failure does not constitute ineffective assistance of counsel for the reason that Petitioner has no right to counsel to file a petition for certiorari and, therefore, has no right to effective assistance of counsel."

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[1] The rule in *Harris* was modified as applied to death penalty cases. *Jackson*, 732 So. 2d at 191 (¶12) ("[I]n capital cases, state post-conviction efforts, though collateral, have become part of the death penalty appeal process at the state level[,]" entitling those on death row "to appointed and compensated counsel to represent him in his state post-conviction efforts."); *see also* 1 Jeffrey Jackson, Mary Miller & Donald Campbell, *Encyclopedia of Mississippi Law* § 6:10, at 237-39 (2d ed. 2015).

¶17. Because the arguments in *Harris* were advanced by the State to the trial court, and because *Harris* remains the paramount case on this issue, it undoubtedly informed the resulting opinion. However, Roark's case differs in a key way from *Harris*—the petitioner here did not have *appointed* counsel but had *retained* counsel. The order denying the PCR motion assumes a fact not present in this case—that Roark was complaining of his lawyer's ineffectiveness at the certiorari stage even though he was not due an appointed lawyer under precedent. But the uncontradicted evidence in this case was that Roark's counsel was paid by his parents to represent him. Because *Harris* does not fully apply to this case, the trial court's conclusion cannot survive our standard of review.

¶18. Nonetheless, "we have the authority to affirm a trial-level court when it reaches the correct result, even when that court's reasoning was incorrect." *Smith v. State*, No. 2018-CP-00814-COA, 2019 WL 3297052, at *3 (¶10) (Miss. Ct. App. July 23, 2019), *cert. denied*, No. 2018-CT-00814-SCT, 2020 WL 1026560 (Miss. Feb. 6, 2010). This Court has also held that the failure of a defendant's appellate counsel to file a motion for rehearing or a petition for writ of certiorari following affirmance on his direct appeal did not prejudice the defendant. *Robinson v. State*, 75 So. 3d 1148, 1154-55 (¶¶23-24) (Miss. Ct. App. 2011).

¶19. Regardless of whether counsel's performance was deficient, "actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Strickland*, 466 U.S. at 693. This is because "[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial." *Id*. "Representation is an art, and an act or

omission that is unprofessional in one case may be sound or even brilliant in another." *Id*. In the end, "[e]ven if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense." *Id*.

¶20. We do not need to decide whether Roark's counsel was deficient to conclude that the petitioner failed to "affirmatively prove prejudice" in this case. In his affidavit to this Court, Roark never raises how he was prejudiced or denied access to a resolution of his claims on appeal. Indeed, Roark does not even mention prejudice, which he is required to prove, and only argues that if he had been informed about the ability to seek certiorari review, then he "would have made it clear that [he] wanted to pursue [his] appeal to the Mississippi Supreme Court." He does not provide any evidence how he was prejudiced by not seeking certiorari review. Roark also does not provide any support that the Court of Appeals' decision was "in conflict with a prior decision of the Court of Appeals or published Supreme Court decision," that the decision failed to consider "a controlling constitutional provision," or that the Supreme Court should have decided the matter in the first place—which, by our Rules of Appellate Procedure, are the ordinary situations in which the Supreme Court grants certiorari review. M.R.A.P. 17(a)(1)-(3).

¶21. Roark's claim for ineffective assistance of counsel at the permissive route of review via certiorari can also be distinguished from a failure to pursue review via direct appeal. For "[w]hen an attorney contracts to pursue an appeal, it is incumbent upon the attorney to take all necessary steps to protect the defendant's right of appeal." *Holland v. State*, 656 So. 2d

1192, 1198 (Miss. 1995).

¶22. Ultimately, Roark received a full consideration of whether his PRS was wrongfully revoked in a full decision on the merits by the Court of Appeals, which was then tested by a request for rehearing. He has failed to show how he was prejudiced by being foreclosed from accessing a permissive route of review to the Supreme Court—one that is rarely granted.[2] Having failed to show prejudice, we conclude that he has not shown that his counsel was ineffective, and so we affirm the trial court's denial of his PCR motion.

¶23. In his brief to this Court, Roark also attempts to argue two further assignments of error. Both of these issues were fully briefed and resolved in the 2016 appeal to this Court, and the present contentions are carbon copies of those issues. These issues are therefore procedurally barred under the doctrine of res judicata. *See Estate of Oliver v. Oliver*, No. 2016-CP-01757-COA, 2019 WL 1615046, at *10 (¶45) (Miss. Ct. App. Apr. 16, 2019) (listing the five requirements of the doctrine).

¶24. For the foregoing reasons, the judgment of the Rankin County Circuit Court denying the motion for PCR is affirmed.

¶25. **AFFIRMED.**

CARLTON, P.J., GREENLEE, WESTBROOKS AND McDONALD, JJ., CONCUR. LAWRENCE, J., CONCURS IN PART AND DISSENTS IN PART WITHOUT SEPARATE WRITTEN OPINION. J. WILSON, P.J., CONCURS IN

[2] Roark's petition for writ of certiorari was due in 2017. In that year, the Supreme Court granted 34 petitions for certiorari review of the 171 filed; the same year, the Court of Appeals handed down 478 decisions handled on the merits, meaning the Supreme Court reviewed through certiorari 7% of the decisions issued by this Court. *See* Admin. Office of Courts, State of Miss. Judiciary, *2017 Annual Report*, https://courts.ms.gov/research/reports/SCTAnnRep2017.pdf, at 23 (last visited Mar. 17, 2020).

PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION, JOINED BY BARNES, C.J., TINDELL, LAWRENCE AND C. WILSON, JJ.; GREENLEE, J., JOINS IN PART.

J. WILSON, P.J., CONCURRING IN PART AND DISSENTING IN PART:

¶26. I concur that the circuit court's order denying Roark's second motion for post-conviction relief (PCR) must be affirmed. The entire appeal could be disposed of by citation to *Fluker v. State*, 170 So. 3d 471, 475 (¶10) (Miss. 2015), which held "that a second or subsequent challenge to the same revocation decision is barred as a successive motion under [Mississippi Code Annotated subsection 99-39-23(6) (Rev. 2015)]."

¶27. However, I disagree with the lead opinion's conclusion that Roark possessed a right to the effective assistance of counsel in his prior appeal from the denial of his first PCR motion. *Ante* at ¶17. In that respect, the lead opinion is contrary to clear precedent (1) that there is no right to counsel in post-conviction cases; and (2) that when there is no right to counsel, there also is no right to the effective representation of counsel.

¶28. In Roark's second PCR motion, he claims that he received ineffective assistance of counsel on appeal from the order denying his first PCR motion. However, **"[a] defendant has no state or federal right to counsel in post-conviction proceedings."** *Sheffield v. State*, 881 So. 2d 249, 255 (¶24) (Miss. Ct. App. 2003) (emphasis added); *accord Coleman v. Thompson*, 501 U.S. 722, 752 (1991). And **"[w]here there is no constitutional right to counsel, there can be no deprivation of effective assistance."** *Sheffield*, 881 So. 2d at 255 (¶24) (emphasis added) (citing *Wainwright v. Torna*, 455 U.S. 586, 588 (1982)); *accord Coleman*, 501 U.S. at 752. As our Supreme Court has noted, the U.S. Supreme Court has

held "directly and clearly" that when there is no constitutional right to counsel there is no "constitutionally based right to effective counsel." *Harris v. State*, 704 So. 2d 1286, 1289 (Miss. 1997) (citing *Wainwright*, 455 U.S. at 587-88), *abrogated in part on other grounds by Jackson v. State*, 732 So. 2d 187, 191 (¶12) (Miss. 1999) (holding that there is a right to counsel in post-conviction proceedings in death penalty cases). In *Wainwright*, the U.S. Supreme Court specifically held that because the defendant "had no constitutional right to counsel" to file an application for discretionary review in the state supreme court, "he could not be deprived of the effective assistance of counsel by his *retained counsel's* failure to file the application timely." *Wainwright*, 455 U.S. at 587-88 (emphasis added). Thus, Roark's ineffective assistance claim fails as a matter of law for a simple reason: in his first post-conviction proceeding, he had no right to counsel—period—and, hence, no right to the effective assistance of counsel.

¶29. The lead opinion's reliance on the fact that Roark's attorney was retained rather than appointed is contrary to clear precedent. As just stated, *Wainwright* specifically held that when a defendant has no constitutional right to counsel, alleged errors by retained counsel cannot give rise to a constitutional violation. *Id.*; *see also Buck v. Davis*, 137 S. Ct. 759, 775 (2017) ("The Sixth Amendment right to counsel *is* the right to effective assistance of counsel." (emphasis added) (quotation marks omitted)). For purposes of a claim of ineffective assistance of counsel, "nothing turns on whether defense counsel was appointed or retained." *Read v. State*, 430 So. 2d 832, 837 n.1 (Miss. 1983). Thus, while a prisoner can hire an attorney to file a PCR motion, he does not thereby purchase a constitutional right to

effective representation—i.e., the attorney's retention does not trigger a constitutional right unavailable to unrepresented prisoners.[3]

¶30. In summary, I concur that the judgment of the circuit court must be affirmed pursuant to the Supreme Court's decision in *Fluker*, *supra*, but I disagree with the lead opinion's unprecedented conclusion that there is a right to effective representation of counsel in a non-capital post-conviction proceeding.[4]

BARNES, C.J., TINDELL, LAWRENCE AND C. WILSON, JJ., JOIN THIS OPINION. GREENLEE, J., JOINS THIS OPINION IN PART.

[3] By concluding otherwise, the lead opinion would grant wealthy prisoners greater constitutional rights than indigent prisoners. A wealthy prisoner would have a constitutional right to the effective assistance of counsel, while his indigent counterpart would have no right to counsel whatsoever.

[4] It is also worth noting that this case is even further removed from any recognized constitutional right to counsel than the typical post-conviction challenge. Roark's PCR motions have challenged only his parole revocation, not his underlying conviction or sentence. In general, there is no right of counsel at a parole revocation hearing. *See, e.g.*, *Riely v. State*, 562 So. 2d 1206, 1209 (Miss. 1990) (explaining that there is no general right to counsel in revocation hearings, though counsel may need to be appointed in cases that are "complex or otherwise difficult to develop").